IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE, CIVIL JURISDICTION
SECOND APPEAL NO.95 OF 1998

1. Shri Hariba Babu Babar
2. Sou. Sundarabai Hariba Babar **..Appellants (Orig. Defendants)**

Versus

Shri Appasaheb Dadu Nagargoje **.. Respondent (Orig. Plaintiff)**

Shri C.G. Gavnekar for the Appellants
Shri V.B. Naik for the Respondent

CORAM : ***S.R.SATHE,J.***
DATED : ***22nd FEBRUARY, 2007***

ORAL JUDGEMENT :-

1. The Appellants-original defendants in Regular Civil Suit No. 211 of 1978 have preferred this appeal against the judgement and order passed by the Court of 3rd Additional District Judge, Sangli in First Appeal No.438 of 1989 whereby the order passed by the Trial Court decreeing the Plaintiff's suit in his favour and directing the defendants to execute the Sale Deed of the suit land in favour of Plaintiff was confirmed and appeal was dismissed with costs. For the sake of convenience hereafter the parties shall be referred to as *'Plaintiff'* and *'Defendants'.*

2. The brief facts giving rise to this appeal are as under :-

The suit land bearing block No.305 situated at village Narwad, Taluka Miraj is owned by Defendant No.1. The defendant No.2 is the wife of defendant No.1. On 14/04/1976, the defendant No.1 agreed to sell the land admeasuring 1 H. 48 R. out of the suit block No.305 to Plaintiff for Rs. 5280/- and executed an agreement to sale in favour of Plaintiff by accepting earnest money of Rs. 1525/-. As per the terms and conditions of the said agreement defendant had agreed to obtain the necessary permission from the concerned authority for the sale of land. It was further agreed that after obtaining such permission, the defendant would inform the Plaintiff and then Plaintiff should get the Sale Deed executed within one month from the same. It was further agreed that if at that time any amount is due from the defendant to Land Development Bank then Plaintiff should pay the said amount to the Bank and balance amount be paid to the defendant in cash. On the date of execution of the agreement to sale the Plaintiff was also put in possession of the suit land. The defendant No.2 thereafter gave consent to the above agreement and agreed to execute the Sale Deed as

mentioned in the agreement. Thereafter, on 14/06/1976 the Plaintiff paid an amount of Rs. 1,200/- to the defendant for clearing the dues of Land Development Bank and accordingly, defendant after paying such amount to the bank handed over the receipt of the same to Plaintiff. Though, at the time of execution of agreement to Sale there was necessity to obtain permission for sale of land, admittedly, such permission was not necessary thereafter. Hence, on 21/07/1978, Plaintiff issued notice to the defendant and called upon him to accept the balance amount and to execute the Sale Deed as agreed. The defendant gave reply to the same and refused to execute the Sale Deed. Hence, Plaintiff filed suit for specific performance against the defendants on 16/08/1978.

3. The defendants filed their joint Written Statement at Exh-12 and opposed the suit claim on several grounds.

4. They firstly contended that boundaries of the suit land given in plaint are not correct and transaction in question was not of an agreement to Sale. According to them, the defendants wanted to clear the loan of bank, society and of some private persons.

They were insisting for the repayment of the loan, defendants therefore approached to the Plaintiff and demanded loan of Rs. 4,000/- from him. It is their contentions that Plaintiff deceived them and got the agreement to Sale executed. According to them, the real transaction was in the nature of mortgage.

5. The defendants also contended that there was in fact no agreement to pay the amount of Rs. 1,200/- to the society but the Plaintiff directly paid the said amount to the society. According to them, even at the time when there was inquiry with regard to application made for grant of permission to sale they had informed the Circle Officer that they have no desire to sale the land.

6. The defendants also contended that Plaintiff is Money Lender. He has advanced money to several persons and purchased several lands by doing such transaction. According to them, they have four sons and they are having share in the suit land. If the decree for Specific Performance is passed, irreparable loss would be caused to them. The defendants also took contention that there was necessity to obtain permission from the District Judge as minor sons had share in the suit

land. Hence on all these grounds, the defendants prayed for dismissal of the suit.

7. On these pleadings, the learned Trial Judge framed issues at Exh-13. In order to prove the suit claim, the Plaintiff examined himself at Exh-34 and scribe Balwant Avati Exh-38. Plaintiff also produced the original agreement to Sale Exh-39 and receipt executed by defendant Exh-40. He also produced office copy of the notice issued to the defendants and its postal acknowledgement.

8. As against this, on behalf of the defendants, defendant No.2 Sundarabai Harba Babar examined herself at Exh-42. After considering the evidence adduced by both the parties, the learned Trial Judge came to the conclusion that suit agreement is legal and valid. Plaintiff was and is ready and willing to perform his part of the contract and the defendants committed breach of the agreement to sale. He, therefore, decreed the suit for specific performance in favour of Plaintiff.

9. Being aggrieved by the above mentioned order, the defendants filed Civil Appeal No.438 of 1989 in the

District Court, Sangli. The 3rd Additional District Judge, Sangli after hearing the arguments of both the learned advocates came to the conclusion that the decree passed by the Trial Court is legal and correct. Naturally, he dismissed the said appeal.

10. The above mentioned order passed by the 3rd Additional District Judge, Sangli is challenged by the original defendants in the present Second Appeal. From the perusal of the record it appears that while admitting the present appeal this Court *(CORAM : D.K. TRIVEDI,J.)* has passed the following order.

" Heard.

Admit, Expedite as per grounds 4 to 6. "

The said grounds mentioned in the appeal memo are as under :-

*" **4.** Both the lower Courts erred in not following the well settled principles of law while decreeing a suit for specific performance that averments in the plaint to the effect that the plaintiff was always ready and willing to perform his part of the contract was mandatory as held by the Supreme Court in 'Prem Rag V/s. The*

D.L.F. Housing and Construction (Private) Ltd. and another reported in AIR 1968 Supreme Court 1355 and in 'Ouseph Varghese V/s. Joseph Aley and Others' and reported in 1969(2) Supreme Court Cases 535.

5. *Both the lower Courts below erred in law by not holding that the suit as filed by the original Plaintiff and Respondent herein was not maintainable in the absence of averments in the plaint showing his readiness and willingness to perform his part of the contract as he still had to perform it.*

6. *The lower appellate Court erred in law by holding that a statement made by Shri Appasaheb Dadu Nagargoje in paragraph 2 of his examination-in-chief was sufficient to indicate his readiness and willingness and would amount to a compliance of section 16 (c) of the Specific Relief Act, 1963. "*

11. In this appeal before me, Shri C.G. Gavnekar learned Advocate for the defendants has urged only two

points. *Firstly,* he submitted that both the Courts below have not properly appreciated the evidence on record and have failed to note that in the instant case, there was no compliance of Section 16(c) of the Specific Relief Act, 1963 (hereafter referred to as the said Act). *Secondly,*he canvassed before me that even if it is held that the suit agreement is legal and valid and Plaintiff was ready and willing to perform his part of the contract still considering the circumstances of the case the discretionary relief of specific performance may not be granted in the instant case. As against this, Shri Vinit Naik, learned Advocate for the Plaintiff supported the judgement and order passed by the Courts below and submitted that Plaintiff was all along ready and willing to perform his part of the contract. In fact, he has done whatever he was supposed to do and both the Courts below have rightly granted decree for Specific Performance in favour of Plaintiff. He, therefore, submitted that the appeal be dismissed.

12. Shri Gavnekar, learned advocate for the defendants submitted that in the instant case, the Plaintiff has not averred and proved that he was and is ready and willing to perform his part of the contract. According to him, mere production of the agreement to

sale and evidence to show that he has paid the earnest money is not sufficient to hold that there is proper compliance of Section 16(c) of the said Act. In order to find out whether there is proper compliance of Section 16(c) of the said Act, it would be worthwhile to see what the said section says. It runs as follows:-

> *" **16. Personal bars to relief –** Specific performance of a contract can not be enforced in favour of a person –*
>
> ***(a)*** *.....*
>
> ***(b)*** *.....*
>
> *.....*
>
> ***(c)*** *who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.*
>
> *Explanation– For the purposes of clause (c)-*
>
> *(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court ;*

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

13. While considering whether the Plaintiff has complied the above section it is first necessary to see the averments in the Plaint. In the Plaint, Plaintiff has specifically averred that as per the agreement of sale he paid the earnest money of Rs. 1525/- to the defendants. Not only that but thereafter amount of Rs. 1,200/- was also paid by him towards the bank dues and thus out of consideration of Rs. 5,280/-, the defendants received in all Rs. 2,725/- and only balance of Rs. 2,555/- has to be paid. He has categorically stated that the said balance amount of Rs. 2,555/- is ready with the Plaintiff. He has also stated that as defendants did not execute the Sale Deed in spite of repeated demand, he issued notice dated 21/07/1978 to the defendants. However, defendants by giving reply refused to execute the Sale Deed and hence he was constrained to file the present suit. In the Plaint, it is mentioned :-

" प्रतिवादींना खरेदी रक्कमेपैकी रु 2725/- पोंच झालेली आहे

व उरलेली रक्कम रु 2555/- वादीकडे तयार आहे.

..... उरलेली रक्कम घेउन करारातील अटीनुसार खरेदीपत्र करुन, नोंदवून देणेबददल - प्रतिवादींना वेळोवेळी तोंडी व शेवटी ता.21/07/1978 च्या रजिस्टर्ड नोटीसीने कळविले असता प्रतिवादीनी आपण कराराचे पालन करणार नसल्याचे कळविले आहे. सबब ता. 14 एप्रिल, 1976 च्या साठेखत कराराप्रमाणे खरेदीपत्र होउन नोंदवुन मिळणेबददल वादीस दावा करणे भाग पडले."

14. Shri C.G. Gavnekar learned advocate for the defendants strenuously argued that the averments in the plaint in a suit for Specific Performance should be in accordance with form Nos.47 and 48 Appendix-A of the Code of Civil Procedure. I have carefully gone through the abovementioned form Nos.47 and 48. From the perusal of the same, and its comparison with the averments made by the Plaintiff in his plaint, I have no hesitation to hold that there is practically no much difference between the averments shown in the said format and averments made by the Plaintiff in his suit. It is needless to say that while assessing the real nature and worth of a document or construing a plea in any pleadings, Courts must keep in mind that a plea is not an expression of art and science but an expression

through words to place fact and law of one's case for a relief. Thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the Plaintiff has performed his obligation, one has to see the pith and substance of the plea. Preference has to be given to the substance and not to a mere format. If the averments in the plaint as a whole indicate the readiness and willingness of the Plaintiff to fulfill his part of the obligation under the agreement in question then mere fact that they are differently worded will not milited against the readiness and willingness of the Plaintiff in suit for specific performance of contract for sale. Even perusal of section 16(c) of the said Act clearly shows that the said section does not require any specific phraseology but it only says that the Plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. For this proposition, useful reference can be made to a case reported at **1999 AIR SCW 2559**. In fact, there are various other authoritative pronouncements in which the Apex Court has observed that readiness and willingness can not be treated as strait jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of

the party concerned.

15. Bearing in mind, the provisions of section 16 (c) of the said Act, format No.47 and 48 of the Appendix-A of the Civil Procedure and observations of the Apex Court mentioned above, if we see the plaint in question as well as all other facts and circumstances of the case then it is crystal clear that in the instant case, there was proper and sufficient compliance of section 16(c). *Firstly*, it must be noted that in their Written Statement Exh-12 the defendants have nowhere contended that Plaintiff was not ready and willing to perform his part of the contract. *Secondly*, it must be noted tat admittedly earnest money was paid at the time of an agreement to sale and 3 months thereafter Plaintiff even paid additional amount of Rs. 1,200/- for clearing the dues of Land Development Bank which were standing in the name of defendants. This was also done by him in pursuance of the agreement to sale. So, Plaintiff's conduct clearly indicates that he was all along ready and willing to perform his part of the contract. Not only that but admittedly he issued notice to the defendants on 21/07/1978 and called upon them to take the balance amount and execute the Sale Deed. But the defendants refused to execute the same. Thereafter,

he immediately filed the present suit. In the plaint also he averred that he has to pay balance of Rs. 2,555/- and has kept the said amount ready. Thus, from all these facts and circumstances, I have no hesitation to hold that in the instant case, there was proper compliance of section 16(c) of the said Act and both the Courts below have also rightly held accordingly.

16. Shri Gavnekar has drawn my attention to a case **OUSEPH VARGHESE V/S. JOSEPH ALEY AND OTHERS 1969(2) SUPREME COURT CASES 539** to substantiate his proposition that plea of readiness and willingness has to be made in the plaint and in its absence specific performance can not be granted. I have carefully gone through the said ruling. The facts of the said case and the facts of the case in hand are different. In that case, there was oral agreement and admittedly the Plaintiff had not informed to the Court that he was ready and willing to accept the agreement pleaded by the defendant or that he was willing to perform his part of the contract. So under those peculiar circumstances, the decree for specific performance was not granted. While in the instant case the facts are totally different and as such the above cited case is of no help to the present defendants.

17. The learned Advocate for the defendants has also placed reliance on a case **MANJUNATH ANANDAPPA URF. SHIVAPPA HANASI V/S. TAMMANASA AND ORS. AIR 2003 SC 1391** wherein also the Apex Court has held that it is incumbent upon the Plaintiff both to aver and prove that he was all along ready and willing to perform the essential terms of the contract which were required to be performed by him. This proposition is not disputed and can not be disputed. The facts of the said case and the facts of case in hand are quite different. In that case, Sale Deed was to be executed within a period of 3 years. In spite of the expiry of the said period, the plaintiff who had agreed to purchase the property did not take any action. It is only after the period of almost 6 years, he filed suit for specific performance. In that also there were no averments with regard to readiness and willingness or anything to show that he was all along ready to perform and had performed his part of the contract. So, under such peculiar circumstances relief of specific performance was denied. In the case at hand, we find that Plaintiff was all along vigilant in performing his part of the contract. He also kept the balance amount ready, issued necessary notice to defendants at proper time and

called upon them execute the sale deed and when they failed, he filed the present suit with necessary averments. The said averments were also not specifically denied by the defendants. So, the above cited ruling is certainly of no help to the present defendants.

18. Shri Gavnekar, learned Advocate for the defendants submitted that in the instant case even if it is held that that suit agreement is legal and valid and Plaintiff was and is ready and willing to perform his part of the contract still considering the fact that the defendants are poor person, they had in fact sold the land to raise money for clearing the loan amount, the consideration mentioned in the agreement is also very low, the discretionary reliefs of specific performance should not be granted in favour of the Plaintiff. According to him, in order to do justice to the parties the defendants can be directed to pay some amount to the Plaintiff in addition to refund of earnest money and decree for specific performance be set aside. *Firstly*, it must be noted that all such contentions raised by the defendants have been negatived by the Courts below. Now there is no substantial question of law in that behalf and as such

the arguments advanced by the learned Advocate for the defendants need not to be considered. However, even we assume for the sake of argument that the abovementioned argument can be considered even at this stage, let's find out whether there is any substance in the same and whether in the instant case, it is necessary to set aside the decree for specific performance.

19. While considering the above point one has to refer to Section-20 of the said Act. It runs as follows:-

> **" 20. Discretion as to decreeing specific performance** – (1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.
>
> (2) The following are cases in which the Court may properly exercise discretion not to decree specific performance -
>
> (a) where the terms of the contract or

the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1 – Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause(a) or hardship within the meaning of clause (b).

Explanation 2 – The question whether the performance of a contract would involve

hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

20. It is needless to say that it is well settled that ordinary rule is that specific performance should be granted. It ought to be denied only when equitable consideration point to its refusal and the circumstances show that the damages would constitute an adequate relief. In the instant case, as already

pointed out above, though the defendant had taken the contention that the price of the suit land was much more and transaction was in the nature of mortgage, the defendants utterly failed to adduce any evidence worth the name to support their contention. So, both the Courts below rightly held that the transaction in question was of an agreement to sale and the said agreement was legal and valid. Then we find that this is not a case where Plaintiff has not come to the Court with clean hands. Nor it can be said that Plaintiff has taken or is trying to take any undue advantage of his position. Plaintiff is also not guilty of delay and latches. When such is the position, I have no hesitation to hold that the facts and circumstances of the present case do not warrant departure from the ordinary rule namely that specific performance should be granted. Then it must be noted that it is now well settled that a Court of appeal should not ordinarily interfere with the discretion exercised by the Courts below, particularly when, it appears that the Courts below have exercised the discretion reasonably and in judicial manner. Merely because the Appellate Court feels that different view can be taken in the matter, such different view may not justify interference with the Trial Courts exercise of discretion. As is often

said, it is ordinarily not open to the appellate Court to substitute its own discretion for that of the trial Judge, but if it appears to the Appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the Appellate Court to interfere with the trial courts exercise of discretion. At the cost of repeatation, I may say that the case in hand certainly does not fall in the later category where it can be said that the Courts below have wrongly exercised the discretion. Hence, I am not at all inclined to accept the arguments advanced by the learned Advocate for the defendants in this behalf.

21. Thus, from the above discussion, it is very clear that both the Courts below have rightly decreed the suit for specific performance in Plaintiff's favour. There is absolutely no need to interfere with the said finding. Hence, I pass the following order.

O R D E R

The appeal is dismissed with costs.

(S.R. SATHE,J.)